IN THE COURT OF APPEALS OF THE STATE OF ALASKA

YAKO WILLIAM COLLINS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12816

Trial Case No. 3PA-08-00803CR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT PALMER
HONORABLE JONATHAN A. WOODMAN, JUDGE

SUPPLEMENTAL BRIEF OF APPELLANT

ALASKA PUBLIC DEFENDER AGENCY

SAMANTHA CHEROT (1011072)
PUBLIC DEFENDER

KELLY R. TAYLOR (1011100)
ASSISTANT PUBLIC DEFENDER
900 West 5th Avenue, Suite 200
Anchorage, Alaska 99501
Telephone: (907) 334-4400

Filed in the Court of Appeals
of the State of Alaska
_____, 2021

MEREDITH MONTGOMERY, CLERK
Appellate Courts

_____
Deputy Clerk

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

AUTHORITIES RELIED UPON.....viii

I. The Alaska Supreme Court Has Taken a Single, Cohesive Approach to Legislators' Post-Enactment Statements of Legislative Intent that Generally Gives Those Statements Little Weight. 1

A. The supreme court set out its basic approach to these statements in *Hillman* and has repeatedly reaffirmed that basic approach. 1

B. The three Alaska cases on which the tentative decision relies do not undermine the *Hillman* line of cases. 4

C. The out-of-state cases on which the tentative decision relies also do not undermine the *Hillman* approach. 9

II. Regardless Whether "the Doctrine of Clarifying Legislation" Applies in Other Cases, It Does Not Apply Here. 13

A. Procedural history of *Collins* and the 2006 sentencing statute 13

B. The tentative decision's application of "the doctrine of clarifying legislation" improperly relies only on the legislature's 2013 amendment to interpret the 2006 sentencing statute. 19

C. Application of "the doctrine of clarifying legislation" in this case would undermine the role of the judiciary as the ultimate arbiter of the law. 22

D. Application of "the doctrine of clarifying legislation" in this case would evade the doctrine of stare decisis. 26

E. Application of "the doctrine of clarifying legislation" in this case would erode the federal and state ex post facto clauses. 28

F. Application of "the doctrine of clarifying legislation" in this case would overlook the rules of strict construction and lenity.....30

G. Application of "the doctrine of clarifying legislation" in this case is inconsistent with this court's decisions in *Seigle* and *Jack* and could render unknown numbers of criminal defendants' sentences illegal. 31

III. The Tentative Decision Appropriately Remands This Case for Consideration Whether Sentencing Within the Presumptive Sentencing Range Would Be Manifestly Unjust. 34

TABLE OF AUTHORITIES

CASES

Angelica C. v. Jonathan C.
459 P.3d 1148 (Alaska 2020) 4, 5

Bruesewitz v. Wyeth
562 U.S. 223 (2011) 12

Chugach Natives, Inc. v. Doyon, Ltd.
588 F.2d 723 (9th Cir. 1978) 8, 9

Collins v. State
287 P.3d 791 (Alaska 2012) 13, 14, 20, 29

Creson v. State
No. A-11539, 2016 WL 3129388 (Alaska App. June 1, 2016) 17

District of Columbia v. Heller
554 U.S. 570 (2008) 12

Doe v. State
189 P.3d 999 (Alaska 2008) 28

Flisock v. State
818 P.2d 640 (Alaska 1991) 3

Greenwich Hosp. v. Gavin
829 A.2d 810 (Conn. 2003) 10, 21

Hageland Aviation Servs., Inc. v. Harms
210 P.3d 444 (Alaska 2009) 2, 4

Heckler v. Turner
470 U.S. 184 (1985) 10, 12

Herring v. State
A-11164, 2013 WL 1933100 (Alaska App. May 8, 2013) 16, 17

Hickel v. Cowper
874 P.2d 922 (Alaska 1994) 2

Hillman v. Nationwide Mutual Fire Insurance Co.
758 P.2d 1248 (Alaska 1988) ..... passim

In re Marriage of Paddock
18 Cal.App.3d 355 (Cal. App. 1971) 9

Indiana Dep't of Revenue v. Kitchin Hospitality, LLC
907 N.E.2d 997 (Ind. 2009).....10

Jack v. State
No. A-10922, 2014 WL 5799455 (Alaska App. Nov. 5, 2014).....17

James v. State
No. A-11377, 2015 WL 9257032 (Alaska App. Dec. 16, 2015).....17

Johnson v. Morris
557 P.2d 1299 (Wash. 1976) 10

Kenai Peninsula School Dist. v. Kenai Peninsula Educ. Assoc.
572 P.2d 416 (Alaska 1977).....2

Lloyd v. State
672 P.2d 152 (Alaska App. 1983) 35

Macchione v. State
123 So.3d 114 (Fla. App. 2013) 15

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803).....9

Matanuska-Susitna Borough v. Hammond
726 P.2d 166 (Alaska 1986).....7, 8

Maves v. State
--- P.3d ----, slip. op. 7501 (Alaska 2021).....3, 4

Municipality of Anchorage v. Sisters of Providence in Washington, Inc.
628 P.2d 22 (Alaska 1981).....5, 6, 30

Pension Benefit Guar. Corp. v. LTV Corp.
496 U.S. 633 (1990).....12

People v. Cuevas
168 Cal.Rptr. 519 (Cal. App. 1980).....9

People v. Jackson
955 N.E.2d 1164 (Ill. 2011) 11

People v. Lewis
183 Cal.Rptr.3d 701 (Cal. App. 2015).....10

Planned Parenthood v. Casey
505 U.S. 833 (1992) 26

Pratt & Whitney Canada, Inc. v. United Technologies
852 P.2d 1173 (Alaska 1993) 26

Smith v. State
711 P.2d 561 (Alaska App. 1985) 34

State v. Andrews
707 P.2d 900 (Alaska App. 1985) 30, 31

State v. Andrews
723 P.2d 85 (Alaska 1986) 30

State v. Aubuchon
90 A.3d 914 (Vt. 2014) 10

State v. Collins
S-14966 (Feb. 12, 2013) 14, 16

State v. Dupier
118 P.3d 1039 (Alaska 2005) 3

State v. Fell
115 P.3d 594 (Ariz. 2005) 10

State v. Fell
97 P.3d 902 (Ariz. App. 2004) 9

State v. Jack
Order, A-12812 (Apr. 19, 2017) 18, 19, 32

State v. Jack
Petition for Review, A-12812 (Feb. 17, 2017) 18, 19, 32, 33

State v. Jack
S-16712 (Aug. 28, 2017) 19, 33

State v. Mullin
778 P.2d 233 (Alaska App. 1989) 30

State v. OSG Bulk Ships, Inc.
961 P.2d 399 (Alaska 1998) 3

State v. Seigle
394 P.3d 627 (Alaska App. 2017) ..... passim

State, Commercial Fisheries Entry Comm'n v. Carlson
65 P.3d 851 (Alaska 2003) 26, 27

Stockton Savings & Loan Bank v. Massanet
114 P.2d 592 (Cal. 1941) 9

Thomas v. Anchorage Equal Rights Comm'n
102 P.3d 937 (Alaska 2004) 26, 27

United States v. Price
361 U.S. 304 (1960) 12

United States v. Stafoff
260 U.S. 477 (1923) 23, 24, 30

United States v. United Mine Workers of America
330 U.S. 258 (1947) 11, 12

University of Alaska v. Tumeo
933 P.2d 1147 (Alaska 1997) 3

Wrangell Forest Products v. Alderson
786 P.2d 916 (Alaska 1990) 2

STATUTES

Alaska Statute 01.10.040 9

Alaska Statute 12.55.165 38

Alaska Statute 22.07.020 27

OTHER AUTHORITIES

5 Am.Jur.2d *Appellate Review* § 518 (updated Nov. 2020) 31

Antonin Scalia & Bryan A. Garner
Reading Law: The Interpretation of Legal Texts (2012) 9

House Journal for 2005-2006 legislature (Apr. 5, 2006) 18

House Journal for 2013-2014 legislature (Apr. 12, 2013) 18

Norman J. Singer & J.D. Shambie Singer
Statutes and Statutory Construction (7th ed. 2007) 34

Senate Journal for 2005-2006 legislature (Apr. 7, 2006) 17

Senate Journal for 2013-2014 legislature (Apr. 12, 2013) 17, 18

Session Laws of Alaska 2013
Chapter 43, Section 1 17

RULE

Alaska Rule of Appellate Procedure 304 25

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION
Article I, Section 15 28

UNITED STATES CONSTITUTION
Article I, Section 9 28

AUTHORITIES RELIED UPON

STATUTES

Alaska Statute 01.10.040 provides:

Words and phrases; meaning of including.

(a) Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.

(b) When the words includes or including are used in a law, they shall be construed as though followed by the phrase but not limited to.

Alaska Statute 12.55.165 provides:

Extraordinary circumstances.

(a) If the defendant is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

(b) In making a determination under (a) of this section, the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present.

(c) A court may not refer a case to a three-judge panel under (a) of this section if the defendant is being sentenced for a sexual felony under AS 12.55.125(i) and the request for the referral is based solely on the claim that the defendant, either singly or in combination, has

(1) prospects for rehabilitation that are less than extraordinary; or

(2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

(d) A court may not refer a case to a three-judge panel under (a) of this section if the request for referral is based, in whole or in part, on the claim that a sentence within the presumptive range may result in the classification of the defendant as deportable under federal immigration law.

Alaska Statute 22.07.020(g) provides:

Jurisdiction.
. . .

(g) A final decision of the court of appeals is binding on the superior court and on the district court unless superseded by a decision of the supreme court.

RULE

Alaska Rule of Appellate Procedure 304 provides:

Grounds for Granting Petition for Hearing.

The granting of a petition for hearing is not a matter of right, but is within the discretion of the court of discretionary review. The following, while neither controlling nor fully measuring that court's discretion, indicates the character of reasons which will be considered:

(a) The decision of the intermediate appellate court is in conflict with a decision of the Supreme Court of the United States or the supreme court of the state of Alaska, or with another decision of the court of appeals.

(b) The intermediate appellate court has decided a significant question concerning the interpretation of the Constitution of the United States or the Constitution of Alaska, which question has not previously been decided by the Supreme Court of the United States or the supreme court of the state of Alaska.

(c) The intermediate appellate court has decided a significant question of law, having substantial public importance to others than the parties to the present case, which question has not previously been decided by the supreme court of the state of Alaska.

(d) Under the circumstances, the exercise of the supervisory authority of the court of discretionary review over the other courts of the state would be likely to have significant consequences to others than the parties to the present case, and appears reasonably necessary to further the administration of justice.

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION
Article I Section 15 provides:

Prohibited State Action

No bill of attainder or ex post facto law shall be passed. No law impairing the obligation of contracts, and no law making any irrevocable grant of special privileges or immunities shall be passed. No conviction shall work corruption of blood or forfeiture of estate.

UNITED STATES CONSTITUTION
Article I, Section 9 provides:

. . .

The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto Law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

I. The Alaska Supreme Court Has Taken a Single, Cohesive Approach to Legislators' Post-Enactment Statements of Legislative Intent that Generally Gives Those Statements Little Weight.

The tentative decision says "the supreme court has made potentially conflicting statements regarding how much weight courts should give to legislative efforts to clarify an earlier statute's meaning."[1] The tentative decision then separates five Alaska Supreme Court cases into two distinct "line[s] of cases" and concludes that the supreme court adopted what the tentative decision names "the doctrine of clarifying legislation."[2] But rather than representing two conflicting approaches to legislators' post-enactment statements of legislative intent, the cited cases reflect a single, cohesive approach that generally gives little or no weight to legislators' post-enactment statements of legislative intent.

A. The supreme court set out its basic approach to these statements in *Hillman* and has repeatedly reaffirmed that basic approach.

In *Hillman v. Nationwide Mutual Fire Insurance Co.*,[3] the Alaska Supreme Court rejected one party's argument that a statutory change should be read as a clarification of the pre-existing law. The supreme court rejected the argument because an "amendment to an unambiguous statute is generally presumed to indicate a substantive change in the law" and because "inquiry as to whether a legislature

---

1 Tentative Decision, *Collins v. State*, A-12816, at 11 (Dec. 8, 2020).

2 *Id.* at 11-17.

3 758 P.2d 1248 (Alaska 1988).

which has amended a statute intends to change or merely clarify the statute is usually fruitless."[4] The supreme court went on to explain:

> While the legislature is fully empowered to declare present law by legislation, it is not institutionally competent to issue opinions as to what a statute passed by an earlier legislature meant. If the legislature were in some form to declare its opinion as to the meaning of prior law, that declaration would be entitled to the same respect that a court would afford to, for example, an opinion of a learned commentator; that is, the court would examine the reasoning offered in support of the opinion and either reject or accept it based on the merit of the reasons given.[5]

The supreme court has repeatedly reaffirmed this basic approach to legislators' post-enactment statements of legislative intent. The tentative decision recognized two such cases, *Hickel v. Cowper*[6] and *Hageland Aviation Servs., Inc. v. Harms*.[7] But there have also been at least six others: *Wrangell Forest Products v. Alderson*;[8]

---

[4] *Id.* at 1252.

[5] *Id.* at 1252-53. The supreme court further noted:

> It is possible to argue that the legislature has knowledge superior to a disinterested commentator because there may be some legislators in the current legislature who were also members of the legislature which passed the prior law and thus have special insight into the intent of the legislature. However, the force of this is dispelled when one considers that it is not permissible to allow a legislator to testify on the question of his unexpressed legislative intent or on the unexpressed legislative intent of others.

Id. (citing *Kenai Peninsula School Dist. v. Kenai Peninsula Educ. Assoc.*, 572 P.2d 416 (Alaska 1977)).

[6] 874 P.2d 922 (Alaska 1994).

[7] 210 P.3d 444 (Alaska 2009).

[8] 786 P.2d 916, 918 n.1 (Alaska 1990) (determining meaning of 1983 workers' compensation statute and holding that 1988 amendment did not apply to appellee and did not "cast light on the meaning of the 1983 act").

Flisock v. State;[9] *University of Alaska v. Tumeo*;[10] *State v. OSG Bulk Ships, Inc.*;[11] *State v. Dupier*;[12] and *Maves v. State*.[13]

In *Dupier*, the supreme court grappled with statutory language it described as "ambiguous" and adopted the state's interpretation of the language but nonetheless rejected the state's argument that a 2004 amendment clarified the pre-existing 2001 law.[14] Quoting *Hillman*, the supreme court explained that it had "followed the *Hillman* rule in a number of subsequent cases."[15]

And in *Maves*—published just last week, in January 2021—the supreme court rejected the state's argument that subsequent legislation clarified the definition

---

[9] 818 P.2d 640, 645 (Alaska 1991) (quoting *Hillman* and determining that 1969 retirement compensation statute included leave payments even though 1982 amendments excluded leave payments and "were meant to clarify the system rather than to change it").

[10] 933 P.2d 1147, 1156 (Alaska 1997) (quoting *Hillman* and rejecting state's argument that failure of any government agency to interpret 1975 law barring marital status discrimination to confer health care benefits on unmarried domestic partners, combined with subsequent legislatures' silence, indicated 1975 law did not confer such benefits).

[11] 961 P.2d 399, 406 & n.13 (Alaska 1998) (quoting *Hillman* and holding that comments at 1991 and 1992 committee hearings suggesting federal tax section had already been incorporated into Alaska law "offer no insight into the thinking of the legislature when it enacted" the applicable statute in 1975).

[12] 118 P.3d 1039 (Alaska 2005) (quoting *Hillman* and rejecting state argument to treat 2004 amendment as clarifying 2001 law).

[13] --- P.3d ----, slip. op. 7501 (Alaska 2021) (quoting *Hillman*; explaining that legislature would have expressly included set-aside convictions in the 1994 version of ASORA if that had been its intent at the time; and concluding that 1999 amendment did not clarify, but changed, the definition of "conviction" under ASORA to include convictions that had been set aside).

[14] *Dupier*, 118 P.3d at at 1045-46 & n.29.

[15] *Id.* at 1045-46 n.29 (citing *Wrangell Forest Products*, *Flisock*, *Hickel*, *Tumeo*, and *OSG Bulk Ships*).

of "conviction" under ASORA.[16] The supreme court quoted *Hageland* quoting *Hillman*:

> Asking " 'whether a legislature which has amended a statute intends to change or merely clarify the statute is usually fruitless' because the legislature's opinion as to the meaning of a statute passed by an earlier legislature is no more persuasive than that of a knowledgeable commentator."[17]

Together, these cases—spanning more than thirty years—reflect the Alaska Supreme Court's approach generally giving little or no weight to legislators' post-enactment statements of legislative intent.

B. The three Alaska cases on which the tentative decision relies do not undermine the *Hillman* line of cases.

The tentative decision cites three supreme court cases as representing a competing "line of cases . . . treat[ing] later legislative action as a strong indication of the legislature's original intent when it enacted the pre-existing statute."[18] But that does not appear correct.

The most recent of those cases, *Angelica C. v. Jonathan C.*,[19] actually quotes *Hillman* and then goes on to "independently decide whether the recent amendments change the effect of [the statute] or merely clarify its meaning."[20] The

---

16 *Maves*, slip. op. 7501, at *12-13.

17 *Id.* at *12-13 & n.49 (quoting *Hageland*, 210 P.3d at 448 n.12 (quoting *Hillman*, 758 P.2d at 1252)).

18 Tentative Decision, *Collins v. State*, A-12816, at 11 (Dec. 8, 2020).

19 459 P.3d 1148 (Alaska 2020).

20 *Id.* at 1158; *see also Hillman*, 758 P.2d at 1252 ("If the legislature were in some form to declare its opinion as to the meaning of prior law, that declaration would be entitled to the same respect that a court would afford to, for example, an opinion of a learned commentator; that is, the court would examine the reasoning

supreme court in *Angelica C.* thus did not rely on the later legislators' comments as "strong indication" of the earlier legislators' intent, as the tentative decision asserts;[21] rather, it "independently decide[d]" whether the amended statute was a change or clarification to the law.[22] *Angelica C.*, decided in 2020, reaffirms the *Hillman* rule.

The tentative decision also relies on two cases decided before *Hillman*. The first of those is *Municipality of Anchorage v. Sisters of Providence in Washington, Inc.*,[23] in which the supreme court said that "dispute or ambiguity surrounding a statute" could indicate a subsequent amendment clarifies the original statute and trigger consideration of that amendment in determining the intent behind the original statute.[24] But this case stands for a relatively limited principle that is fundamentally consistent with *Hillman*.

The statute at issue in *Sisters of Providence* had gone into effect in July 1973; the municipality had twice requested interpretations from the state and received two different responses, one in August 1973 and one in early 1975;[25] and in response to the dispute, the legislature amended the statute in 1976.[26] The parties disputed the meaning of the 1973 statute, and the supreme court ultimately agreed that the

---

offered in support of the opinion and either reject or accept it based on the merit of the reasons given.").

21 Tentative Decision, *Collins v. State*, A-12816, at 11 (Dec. 8, 2020).

22 *Angelica C.*, 459 P.3d at 1158.

23 628 P.2d 22 (Alaska 1981).

24 *Id.* at 28.

25 *Id.* at 26 n.4, 28-29.

26 *Id.* at 26-27.

1973 statute had the same meaning as later amended in 1976.[27] The supreme court emphasized "this sequence of events" leading to the amendment as reflecting the statute's ambiguity and concluded that those events "strongly indicate that the amendment was a clarification of, and not a change in, existing law."[28] The supreme court's decision to consider the 1976 amendment was thus predicated on the ambiguity surrounding the 1973 statute from its inception and the unique circumstances leading to the 1976 amendment.[29] The supreme court's construction of the 1973 statute also relied on its evaluation of the 1973 statutory text[30] and legislative history of the 1973 statute.[31]

In sum, then, the supreme court in *Sisters of Providence* considered the meaning of a 1973 statute it determined ambiguous; it relied on multiple sources to determine the meaning, only one of which was a 1976 amendment to the statute; the amendment does not appear to have included legislators' stated opinions of prior legislative intent; and, based on the unique circumstances leading to the amendment, it independently determined the 1976 amendment clarified the 1973 statute's meaning. *Sisters of Providence* is thus consistent with *Hillman*, which focuses specifically on legislators' post-enactment statements of legislative intent and allows consideration

---

27 *Id.* at 24-32.

28 *Id.* at 29.

29 *Id.*

30 628 P.2d at 29-30 (explaining that the municipality's interpretation of the statute would render another statute redundant).

31 *See id.* at 30 (explaining that "scant but helpful" legislative history from the statute's enactment in 1973 supported Providence's interpretation).

of those statements pursuant to an independent evaluation of the merits of the reasons supporting them.[32]

The tentative decision also relies on a footnote from *Matanuska-Susitna Borough v. Hammond*[33] stating that "[s]ubsequent legislation declaring the intent of a previous enactment is entitled to great weight[.]"[34] But the tentative decision relies on the footnote—part of the discussion of the standard of review applicable in the case—for too much. The supreme court did not cite subsequent legislation for any declaration of the *substance* of prior legislation; rather, it cited subsequent legislation for its continued grant of discretion to the executive branch of government.[35] And the subsequent legislation was only one of several reasons the supreme court reached its conclusion that a reasonable basis standard of review, with wide discretion to the executive department involved, was appropriate.[36] Moreover, despite the text of the

---

[32] *Hillman*, 758 P.2d at 1152-53 (explaining that subsequent legislators' statements of prior legislative intent "would be entitled to the same respect that a court would afford to, for example, an opinion of a learned commentator" and that the supreme court "would examine the reasoning offered in support of the opinion and either reject or accept it based on the merit of the reasons given").

[33] 726 P.2d 166 (Alaska 1986) (determining whether department's definition of "population" was a rational exercise of its discretion).

[34] *Id.* at 176 n.21.

[35] *Id.* at 176.

[36] *Id.* at 175-76. The supreme court determined this standard of review was appropriate *both* because of the significant agency expertise involved and because the legislature intended the department to exercise such discretion. *Id.* at 175. And the supreme court determined the legislature intended the department to exercise such discretion *both* because the legislature explicitly defined some terms but deliberately left other terms "undefined, to allow the department to utilize its expertise" and because the subsequent legislative enactment did not amend the applicable provisions. *Id.* at 175-76.

footnote, the more applicable canon of statutory interpretation seems to be the prior-construction canon, under which statutory language that has previously acquired a particular construction is understood according to that construction:[37] The supreme court explained that the legislature knew of the department's techniques for determining population and of ongoing litigation about those techniques but did not amend the applicable statutory language, thus affirming its prior grant of wide discretion to the department.[38]

For these reasons, *Sisters of Providence* and *Matanuska-Susitna Borough* do not undermine the *Hillman* rule. They were also decided before *Hillman* and the line of cases reaffirming *Hillman*—in 1981 and 1986, respectively—and the supreme court does not appear to have ever cited them for the proposition this court cites them in the tentative decision.[39]

---

[37] *See, e.g.*, AS 01.10.040 ("Technical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 322-26 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.").

[38] *Matanuska-Susitna Borough*, 726 P.2d at 176.

[39] Even the relevant footnote in *Matanuska-Susitna Borough* does not cite *Sisters of Providence* for the proposition; instead, it cites a Ninth Circuit case. *Id.* at 177 n.21 (citing *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 731 (9th Cir. 1978)). And that Ninth Circuit case reached its interpretation of the original statute based on statutory text, legislative history, agency interpretation, and contemporaneous expression of legislative intent before noting that legislature's subsequent amendment was consistent with that interpretation. *Chugach Natives*, 588 F.2d at 725-31.

C. The out-of-state cases on which the tentative decision relies also do not undermine the *Hillman* approach.

To explain "the doctrine of clarifying legislation," the tentative decision cites several out-of-state cases.[40] But those cases do not undermine the Alaska Supreme Court's approach in *Hillman* and subsequent cases.

Many of the cases treat legislators' post-enactment legislative action or statements as but one factor courts can consider when determining the meaning of a statute.[41] They emphasize "[i]t is emphatically the province and duty of the judicial department to say what the law is."[42] And several use strong language to that effect in rejecting invitations to give effect to post-enactment statements of prior legislative intent.[43]

---

[40] Tentative Decision, *Collins v. State*, A-12816, at 7-11 (Dec. 8, 2020).

[41] Although the tentative decision described such legislative action as something courts "should consider," it appears the cases cited for that proposition describe the same as something courts "may consider." *Compare id.* at 10 ("[T]he legislature's action is only a factor that the courts *should consider* when determining the meaning and effect of the pre-existing statute.") (emphasis added) *with Stockton Savings & Loan Bank v. Massanet*, 114 P.2d 592, 595 (Cal. 1941) ("This expression by the legislature . . . is a factor that *may properly be considered* in correctly determining the meaning and effect of the sentence in question.") (emphasis added) *and People v. Cuevas*, 168 Cal.Rptr. 519, 524 (Cal. App. 1980) ("[O]ur courts have concluded that subsequent legislation passed to clarify a statute 'merely supplies an indication of legislative purpose which *may be considered together with other factors* in arriving at the true intent existing at the time the statute was enacted.' ") (quoting *In re Marriage of Paddock*, 18 Cal.App.3d 355, 350 (Cal. App. 1971)) (emphasis added).

[42] *Cuevas*, 168 Cal.Rptr. at 524 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

[43] *State v. Fell*, 97 P.3d 902, 905-10 (Ariz. App. 2004) ("A legislative attempt to retroactively overrule a decision by the courts of this state interpreting a statute violates the separation of powers doctrine."), *aff'd by State v. Fell*, 115 P.3d 594, 600-01 (Ariz. 2005) ("Even assuming [the statute at issue] was ambiguous before [supreme court's decision], no such conclusion was possible after our decision in that

Even when the cases cited in the tentative decision concluded that legislative amendments "clarified" pre-existing law, the courts' legal analysis relied more heavily on statutory interpretation of the pre-existing law and little on post-enactment statements of legislative intent.[44] And one state supreme court discussed

---

case."); *State v. Aubuchon*, 90 A.3d 914, 920-23 (Vt. 2014) ("[A]lthough a legislature may amend a statute to overrule a judicial decision, by doing so, it changes the law, and thus a prospective application of the law is presumed."); *Johnson v. Morris*, 557 P.2d 1299, 925-26 (Wash. 1976) ("Petitioner cites no authority for the proposition that the legislature is empowered to retroactively 'clarify' an existing statute, when that clarification contravenes the construction placed upon that statute by this court. Such a proposition is disturbing in that it would effectively be giving license to the legislature to overrule this court, raising separation of powers problems."). Although these cases involved statutes previously construed by those states' highest courts, the analysis should likewise apply to statutes previously construed by intermediate appellate courts. *See infra* Parts II.C and II.D.

The tentative decision cites a Connecticut Supreme Court case for its statement that even pending cases that trigger legislation can be affected by that legislation. *See* Tentative Decision, *Collins v. State*, A-12816, at 18 n.28 (Dec. 8, 2020). But the tentative decision apparently does not adopt the peculiar approach of that supreme court, which allows the legislature to "clarify" even a statute the supreme court had previously construed without concern for the effect on separation of powers. *Greenwich Hosp. v. Gavin*, 829 A.2d 810, 815-17 (Conn. 2003) (discussing case in which supreme court reversed original decision following "relevant legislative clarification" and rejecting invitation to change approach to such legislation) ("We have chosen, unlike [other] jurisdictions, to defer to the legislature regarding clarifying legislation.").

[44] *See, e.g.*, *Heckler v. Turner*, 470 U.S. 184 (1985) (interpreting text of statute; discussing the "administrative background" and practice supporting textual interpretation, including how certain tax principles have operated historically; explaining "congressional choices manifest" by resulting statute; and then noting that "[w]ere there any doubt remaining . . . , subsequent congressional action would dispel it"); *People v. Lewis*, 183 Cal.Rptr.3d 701, 705-06 (Cal. App. 2015) (discussing "reasonable, practical construction" of pre-existing law "consistent with [its] apparent purpose" and discussing statutory text supporting interpretation before briefly noting that legislative amendment "further supports" court's interpretation of statute); *Indiana Dep't of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997, 1002-03 (Ind. 2009) (setting out "several reasons" for interpretation: prior legislature's likely intent, operation of greater statutory scheme, consistency with canon of statutory

statutory interpretation of the pre-existing law as well as prior intermediate appellate court decisions interpreting the statute.[45]

These out-of-state cases appear rough efforts to articulate an approach similar to *Hillman*—cautioning against giving post-enactment statements of legislative intent weight but acknowledging that such statements "would be entitled to the same respect . . . [as] a learned commentator" and "the court would examine the reasoning offered in support of the opinion and either reject or accept it based on the merit of the reasons given."[46] A few United States Supreme Court decisions, including one issued in 2011, articulate an approach even closer to *Hillman*.

In *United States v. United Mine Workers of America*,[47] the Supreme Court rejected a party's invitation to rely on opinions of legislators expressed in 1943 about the meaning of legislation passed in 1932.[48] The Supreme Court noted that the opinions "were expressed by Senators, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary Committee which reported the bill" and emphasized that the opinions were expressed eleven years after

---

construction that strictly construes statutes against taxpayers, and amendment that appeared intended to clarify pre-existing law).

[45] *See People v. Jackson*, 955 N.E.2d 1164, 1168-72 (Ill. 2011) (interpreting statute according to its text; noting that alternative interpretation would be "irrational"; explaining that although one panel of intermediate appellate court interpreted statute as the defendant had, subsequent intermediate appellate court decisions had disavowed and declined to follow that reasoning; and then adding that subsequent amendment did not appear intended to change pre-existing law).

[46] *Hillman*, 758 P.2d at 1252.

[47] 330 U.S. 258 (1947).

[48] *Id.* at 281-82.

the legislation was passed.[49] In *United States v. Price*,[50] the Supreme Court again explained that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[51]

Justice Scalia, writing for the Supreme Court in *Bruesewitz v. Wyeth*,[52] used even stronger language: "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."[53] He then distinguished reliance on legislative history from reliance on legislators' post-enactment statements of legislative intent:

> Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition "could have had no effect on the congressional vote."
>
> . . . Those who voted on the relevant statutory language were not necessarily the same persons who crafted the statements in the later [report]; or if they were did not necessarily have the same views at that earlier time; and no one voting at that earlier time could possibly have been informed by those later statements.[54]

---

[49] *Id.* These circumstances contrast with those in the Supreme Court case this court cited, in which subsequent statements of legislative intent were expressed in the very next Congress and by members who "were in the thick of the fight." *Heckler*, 470 U.S. at 209-11; *see also supra* note 44 (explaining that the Supreme Court's legal analysis relied more heavily on statutory interpretation of the pre-existing law).

[50] 361 U.S. 304 (1960).

[51] *Id.* at 313; *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-50 (1990) (quoting *Price*).

[52] 562 U.S. 223 (2011).

[53] *Id.* at 241-42.

[54] *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)).

Hillman remains the clearest and most fully elaborated articulation of Alaska Supreme Court's approach to legislators' post-enactment statements of legislative intent. Since *Hillman* was decided in 1988, the supreme court has consistently relied upon it as embodying the court's approach to this question of statutory interpretation. *Hillman* is also clearer and more fully elaborated than most of the out-of-state cases cited in the tentative decision, and its approach is supported by decisions of the United States Supreme Court. This court should follow *Hillman*.

II. Regardless Whether "the Doctrine of Clarifying Legislation" Applies in Other Cases, It Does Not Apply Here.

Even if the tentative decision's conceptualization of "the doctrine of clarifying legislation" could apply in some cases, it does not apply in this case. Here, this court already interpreted the statute at issue, more than eight years ago, and in this precise case.[55] If this court were to interpret the legislature's subsequent amendment of the statute—in direct response to this court's decision—as "clarifying" the original meaning of the statute, this court would undermine the separation of powers, the doctrine of stare decisis, and longstanding principles of statutory interpretation.

A. Procedural history of *Collins* and the 2006 sentencing statute

This court issued a published decision in *Collins* interpreting the 2006 sentencing statute.[56] This court held that the statute was based on legislative "findings that sex offenders usually have committed multiple sex offenses by the time

---

[55] *Collins v. State*, 287 P.3d 791 (Alaska 2012).

[56] 287 P.3d 791 (Alaska 2012).

they are caught, that they often do not respond to rehabilitative treatment, and that they therefore cannot be safely released into society."[57] This court also held that the legislature "explicitly recognized that there would be cases in which a sentence within the presumptive range would be manifestly unjust" that would require referral to the three-judge panel.[58] Accordingly, this court held that "defendants convicted of sex offenses . . . should be able to obtain referrals to the three-judge sentencing panel if they can show that these assumptions do not apply to them."[59] This court issued its decision in November 2012, over then-Judge Bolger's dissenting opinion.[60] The state filed a petition for hearing, and the Alaska Supreme Court granted that petition in February 2013.[61]

Meanwhile, the 2013-14 legislature introduced and ultimately passed a bill that made a number of statutory changes to sex offenses, one of which was overturning *Collins* and endorsing the dissenting opinion.[62] The bill declared that the 2005-06 legislature, when it enacted increased penalties for offenders convicted of sexual felonies, "did not intend . . . to create new or additional means for a defendant convicted of a sexual felony . . . to obtain referral to a three-judge panel[.]"[63] But the

---

57 *Id.* at 796.

58 *Id.*

59 *Id.*

60 *Id.* at 791, 797.

61 Order, *State v. Collins*, S-14966 (Feb. 12, 2013).

62 SLA 2013, ch. 43, § 1(c).

63 SLA 2013, ch. 43, § 1(b).

circumstances of the amendment indicate this court should not consider the enactment a clarification of the 2006 sentencing statute.

Eight years had passed. The majority of legislators who comprised the 2013-14 legislature did not comprise the 2005-06 legislature, and of those legislators who did, some had not voted on one of the two bills. Only seven of the twenty 2005-06 senators, and only fourteen of the forty 2005-06 representatives, voted to pass both final bills;[64] in other words, only thirty-five percent of legislators purporting to express the view of the prior legislature had actually participated in the final vote in the prior legislature.[65] And because the bill made a number of changes to criminal

---

[64] The senators who voted yes on both final bills were Dyson, Ellis, French, Hoffman, Huggins, Olson, and Stevens. (Stedman voted yes on an earlier version of the 2013 bill but was absent during voting on the final 2013 bill.) The representatives who voted yes on both final bills were Chenault, Gruenberg, Hawker, LeDoux, Lynn, Neuman, Olson, Seaton, Stoltze, and Wilson. In addition, Coghill, Gardner, McGuire, and Meyer voted yes on the final 2006 bill as representatives, later became senators, and voted yes on the final 2013 bill as senators. (Foster, Gara, and Kerttula were absent during voting on the final 2006 bill but voted yes on the final 2013 bill; conversely, Guttenberg voted yes on the final 2006 bill but was excused during voting on the final 2013 bill.) *Compare* Senate Journal for 2005-2006 legislature, at 2706 (Apr. 7, 2006) *with* Senate Journal for 2013-2014 legislature, at 1181 (Apr. 12, 2013) (both available online at akleg.gov); *compare* House Journal for 2005-2006 legislature, at 3016 (Apr. 5, 2006) *with* House Journal for 2013-2014 legislature, at 1123 (Apr. 12, 2013) (both available online at akleg.gov).

[65] One of the cases cited in the tentative decision explains that the longer the span of time between enactment of the original statute and its amendment, the less it can be considered a clarification. *Macchione v. State*, 123 So.3d 114, 117 (Fla. App. 2013), *cited in* Tentative Decision, *Collins v. State*, A-12816, at 10 n.19 (Dec. 8, 2020). It further notes that an amendment passed ten years after the original statute could not be considered a clarification. *Id.* (citing a prior case holding "it is inappropriate to use an amendment enacted ten years after the original enactment to clarify original legislative intent" and citing another prior case holding "[i]t would be absurd . . . to consider legislation enacted more than ten years after the original act as a clarification of original intent") (editing marks in *Macchione*) (citations omitted).

laws related to sex offenses, the legislators who voted in favor of the bill might well have done so not because they necessarily agreed with its characterization of the prior legislature's intent but because they wanted to overturn *Collins* and/or agreed with other aspects of the bill. The legislature passed the bill in April 2013, and the governor signed it in June 2013.[66]

After the legislature passed the bill but before the governor signed it, this court continued to treat Collins as good law. In *Herring v. State*,[67] an unpublished decision, this court affirmed the trial court's rejection of a proposed mitigating factor but vacated two other rulings and directed the trial court to reconsider those rulings in light of *Collins*.[68]

The Alaska Supreme Court did not dismiss the state's petition for hearing but proceeded to hold oral argument in *Collins* in October 2013.[69] The supreme court also did not dismiss the state's petition for hearing promptly after oral argument. Instead, the supreme court dismissed the state's petition for hearing as improvidently granted, without further comment, more than four months later, in February 2014.[70]

---

[66] *See* Senate Journal for 2013-2014 legislature, at 1181 (Apr. 12, 2013) (stating that Senate concurred in House amended bill, thus adopting bill), and at 1306 (June 24, 2013) (stating that governor signed bill on June 11).

[67] A-11164, 2013 WL 1933100 (Alaska App. May 8, 2013) (unpublished).

[68] *Id.* at *3.

[69] *See State v. Collins*, S-14966, Gavel Alaska, KTOO.org (noting that argument was held on October 16, 2013, at 10:30 a.m.).

[70] *See* Order, *State v. Collins*, S-14966 (Feb. 25, 2014).

This court, meanwhile, continued to face but did not resolve questions about how trial courts should handle cases following the legislature's amendment. The trial court in *Herring v. State*[71] inquired whether its reevaluation should proceed "or whether the legislature's enactment . . . rendered any reevaluation moot."[72] This court reevaluated the record and concluded that, under *Collins*, it was not manifestly unjust to sentence Herring within the presumptive range based on the facts of the case.[73] *Herring* thus revealed that *Collins* had provided a modest remedy, not available to defendants in especially serious cases, and did not cast doubt on the validity of *Collins*. In three subsequent cases, this court noted its uncertainty "what legal effect should be attributed to our decision in *Collins*" and decided those cases on alternative grounds.[74]

Then in March 2017, this court issued a published decision in *State v. Seigle*[75] rejecting the state's argument that, due to this procedural history, *Collins*

---

[71] No. A-11164, 2016 WL 3959913 (Alaska App. July 20, 2016) (unpublished).

[72] *Id.* at *1.

[73] *Id.* at *4. Herring had left a mental health treatment facility against medical advice, gathered items for kidnapping and sexual assault, and then kidnapped and raped his ex-wife three times over the course of an hour. *Id.* at *1-2.

[74] *Creson v. State*, No. A-11539, 2016 WL 3129388, at *2 (Alaska App. June 1, 2016) (unpublished) (concluding that sentencing court reasonably declined to refer case to three-judge panel given "guarded at best" prospects for rehabilitation); *James v. State*, No. A-11377, 2015 WL 9257032, at * (Alaska App. Dec. 16, 2015) (unpublished) (concluding sentencing court reasonably declined to refer case to three-judge panel given "guarded" prospects for rehabilitation); *Jack v. State*, No. A-10922, 2014 WL 5799455, at *7 (Alaska App. Nov. 5, 2014) (unpublished) (explaining that defense counsel had failed to request referral to the three-judge panel).

[75] 394 P.3d 627 (Alaska App. 2017).

"was never the law in Alaska."[76] There, a three-judge panel sentenced Seigle to a term below the presumptive range in part based on *Collins*; the state argued that the panel's reliance on *Collins* rendered Seigle's resulting sentence illegal such that the double jeopardy clause did not protect it from reversal on appeal.[77] This court discussed the principle of vertical stare decisis and AS 22.07.020(g), which provides that "[a] final decision of the court of appeals is binding on the superior court and on the district court unless superseded by a decision of the supreme court."[78] While recognizing the legislature's response to *Collins*, this court held that "the supreme court never overruled this [c]ourt's decision in *Collins*, so it was binding precedent on the lower courts until the legislature amended the sentencing statutes, effective July 1, 2013."[79] As such the three-judge panel's sentencing of Seigle was not error.[80]

One month later, this court also denied the state's petition for interlocutory review in *State v. Jack*.[81] Jack had been convicted of sexual offenses occurring in 2008 and, following remand in his appeal, requested referral to the three-judge panel based on *Collins*.[82] The sentencing court granted the request, recognizing that while the legislature had overruled *Collins*, Jack was subject to

---

76 *Id.* at 632 (internal quotation marks omitted).

77 *Id.*

78 *Id.* at 632-33.

79 *Id.* at 634-35.

80 *Id.*

81 Order, *State v. Jack*, A-12812 (Apr. 19, 2017).

82 Petition for Review, *State v. Jack*, A-12812, at 2-3 (Feb. 17, 2017).

Collins and application of the new law to Jack would violate the ex post facto clause.[83] The state petitioned this court for interlocutory review; as the state explained, if the three-judge panel sentenced Jack, the double jeopardy clause would bar appellate courts from later increasing that sentence.[84] In April 2017, this court denied interlocutory review without comment.[85]

The state petitioned for hearing; in August 2017, the Alaska Supreme Court denied the state's petition over two justices' dissent.[86] Justices Bolger and Maassen explained that they would grant the state's petition in part because "[i]f the three-judge panel sentences Jack using this non-statutory factor . . . then the [s]tate will probably lose the opportunity to insist on a sentence within the presumptive range[.]"[87]

B. The tentative decision's application of "the doctrine of clarifying legislation" improperly relies only on the legislature's 2013 amendment to interpret the 2006 sentencing statute.

As explained earlier, even in those out-of-state cases concluding that legislative amendments "clarified" pre-existing law, the courts' legal analysis relied heavily on statutory interpretation of the pre-existing law, and even on prior intermediate appellate court decisions interpreting the law, and relied very little on

---

83 *Id.* at 3.

84 *Id.* at 13.

85 Order, *State v. Jack*, A-12812 (Apr. 19, 2017).

86 Order, *State v. Jack*, S-16712 (Aug. 28, 2017).

87 *Id.* at 3 & n.6 (citing two cases concerning the double jeopardy clause).

post-enactment statements of legislative intent.[88] Recognizing that approach, the tentative decision says that "the legislature's [subsequent] action is only a factor that the courts should consider when determining the meaning and effect of the pre-existing statute," that a court has a duty to consider various aspects of the new enactment (including "whether the legislature's new enactment is consistent with a reasonable interpretation of the pre-existing statute"), and that "the legislature's action is not binding" on this court.[89] But the tentative decision's approach to interpreting the 2006 sentencing statute is qualitatively different; it addresses the 2013 amendment without analyzing, or even acknowledging, such other factors.[90]

When this court interpreted the statute in *Collins*, it considered the statutory text and legislative history and, given that text and history, held that the statute had one meaning.[91] Nonetheless, the tentative decision concludes that the legislature's 2013 amendment "clarified" the 2006 sentencing statute as having the *opposite* meaning because "the legislature explicitly declared that its purpose was to (1) clarify the intent of the pre-existing sentencing statute and (2) disavow the

---

88 *See supra* notes 41-45 and accompanying text.

89 Tentative Decision, *Collins v. State*, A-12816, at 10, 18 (Dec. 8, 2020) ("[A] court should consider such things as the title and contents of the new enactment, the length of time between the original statute and the new enactment, whether the legislature acted in response to a recent controversy concerning the meaning of the pre-existing law, and whether the legislature's new enactment is consistent with a reasonable interpretation of the pre-existing statute.").

90 *Id.* at 17-19.

91 *Collins*, 287 P.3d at 794-97.

interpretation adopted by the *Collins* majority."[92] In other words, the tentative decision relies exclusively on the legislature's 2013 amendment—and the fact that the supreme court had not yet ruled—to conclude that the amendment "clarified" the 2006 sentencing statute. It is unclear how a legislature's subsequent action could be one factor, among many, to consider or would not be binding on the court when that subsequent action is the sole basis for this court's shift in interpretation.

In this way, of all the out-of-state cases the tentative decision cites, this application of "the doctrine of clarifying legislation" is the most similar to that of the Connecticut Supreme Court, which appears alone in its willingness to reverse its own prior decisions in deference to legislative "clarification."[93] This court should not apply "the doctrine of clarifying legislation" in a manner that relies on the legislature's 2013 amendment as the sole basis for changing its construction of the 2006 sentencing statute.

---

[92] Tentative Decision, *Collins v. State*, A-12816, at 18 (Dec. 8, 2020).

[93] *See Greenwich Hosp.*, 829 A.2d at 810-17 (discussing longstanding Connecticut rule that legislative "clarification" is binding on the court, rejecting invitation to change rule to more closely align with other states' approaches, and explaining that "[w]e have chosen, unlike those jurisdictions, to defer to the legislature regarding clarifying legislation").

C. Application of "the doctrine of clarifying legislation" in this case would undermine the role of the judiciary as the ultimate arbiter of the law.

As discussed above,[94] this court interpreted the 2006 sentencing statute in *Collins*, a published decision, and this court held in *Seigle*, a published decision, that *Collins* was binding on lower courts from the time it was issued until the legislature's 2013 amendment went into effect. Despite that, the tentative decision would hold that the legislature's later amendment "clarified" the statute as having the opposite meaning because the legislature said so.[95] This would undermine the role of the judiciary as the ultimate arbiter of the law.

As the tentative decision recognizes, "[T]he doctrine of separation of powers prohibits the legislature from enacting a law that purports to simply retroactively nullify a judicial interpretation of the statute."[96] Indeed, any court would presumably declare the law's intended retroactive effect unconstitutional and invalid. Here, the legislature's 2013 amendment purported to clarify the meaning of the 2006 sentencing statute, and this court's tentative decision would rely on that clarification to nullify its decision in *Collins*. Instead of declaring any intended retroactive effect unconstitutional and invalid, the tentative decision sanctions the retroactive effect and therefore subverts the role of the judiciary as ultimate arbiter of the law.

---

94 *See supra* Part II.A

95 Tentative Decision, *Collins v. State*, A-12816, at 17-21 (Dec. 8, 2020).

96 *Id.* at 7 ("This result follows from the principle that the judicial branch of government is the ultimate interpreter of the law.").

The fact that *Collins* was not decided by, and was on petition before, the Alaska Supreme Court when the legislature's 2013 amendment became effective does not alter this result. The tentative decision suggests that the tension between "the doctrine of clarifying legislation" and the role of the judiciary exists only when the legislature's post-enactment statement of legislative intent "conflicts with an interpretation that has already been announced by the jurisdiction's *highest court*."[97] But the case on which the decision relies, *United States v. Stafoff*,[98] does not make that distinction.

Stafoff was a Prohibition-era case involving several federal criminal charges related to distilling whisky.[99] A United States Supreme Court decision had previously held that the National Prohibition Act repealed certain sections of then-existing law regulating distilleries; Congress later passed a Supplemental Act to the National Prohibition Act providing that those sections of the prior law "shall be and continue in force."[100] The question was whether Stafoff's convictions—which were based on conduct that occurred before the Supplemental Act went into effect—could stand.[101] The Supreme Court held that they could not: While recognizing that "a statute purporting to declare the intent of an earlier one might be of great weight in

---

97 *Id.* at 8 (emphasis added).

98 260 U.S. 477 (1923).

99 *Id.* at 478-79.

100 *Id.* at 479.

101 *Id.* at 481.

assisting a court *when in doubt*, . . . that is not this case."[102] Its prior decision "must stand for the law before [the Supplemental Act went into effect]."[103] In other words, where the court had already interpreted the statute (thereby resolving any doubt as to its meaning), the legislature's later action did not change that interpretation. Although *Stafoff* concerned a prior interpretation by the Supreme Court, the rule logically extends to any decision by an appellate court that sets binding precedent.

Alaska Statute 22.07.020 "expressly declares that the decisions of this [c]ourt are binding precedent until such time as they are affirmatively superseded by a decision of the Alaska Supreme Court."[104] And "most other jurisdictions" likewise follow the rule that "a published decision of an intermediate appellate court must be followed unless and until they are overruled by a higher court."[105] In other words, as this court explained in *Seigle*, *Collins* was binding precedent from the date it was issued, November 2, 2012, until the legislature's 2013 amendment became effective, July 1, 2013.[106] And *Seigle* has been binding precedent from the date it was issued, March 17, 2017.[107]

An alternative rule would not be practical. If only the Alaska Supreme Court's statutory interpretation foreclosed "clarifying legislation," this court's statutory

---

102 *Id.* at 480 (emphasis added).

103 *Id.*

104 *Seigle*, 394 P.3d at 633.

105 *Id.*

106 *Id.* at 634-35.

107 *Id.* at 627.

interpretation would be subject to "clarification" in any case in which the supreme court denied a party's petition for hearing. The tentative decision carves out an apparent distinction for cases in which "the legislature acted while this issue of statutory interpretation was still pending in front of the supreme court,"[108] *i.e.*, cases in which a party petitioned for hearing and the supreme court had not yet ruled when the legislature passed "clarifying legislation." This distinction is equally unworkable.

The tentative decision's distinction would allow parties' decisions whether to file petitions for hearing[109] and the speed with which the supreme court denied pending petitions to determine whether this court's statutory interpretation would have precedential value. Under this distinction, Collins would still have been entitled to this court's interpretation if the supreme court had denied the state's petition for hearing after legislators introduced the bill to overturn *Collins*, or after the bill passed through committees, or after one chamber had passed the bill, or even after the second chamber passed an amended version of the bill. The tentative decision does not indicate whether Collins would still have been entitled to this court's interpretation if the governor had refused to sign the bill or if the supreme court had denied the state's petition after the bill was signed into law but before it took effect.[110]

---

[108] Tentative Decision, *Collins v. State*, A-12816, at 18 (Dec. 8, 2020).

[109] While the supreme court's decision whether to grant a petition for hearing will be motivated by the importance of the case for the development of law in Alaska, *see* Alaska R. App. P. 304, parties' decisions whether to file petitions for hearing are informed by personal concerns, including case-specific strategic considerations and costs of petitioning.

[110] These scenarios also reveal a lack of clarity over what a court would be relying on when it relies on legislators' post-enactment statements of legislative

The tentative decision's conclusion that the 2013 amendment "clarified" the 2006 sentencing statute does not follow *Collins* or *Seigle* or the reasoning in *Stafoff*. Rather, it relies on a legislative amendment to "nullify a judicial interpretation of [a] statute," undermining the role of the judiciary as ultimate arbiter of the law.[111]

D. Application of "the doctrine of clarifying legislation" in this case would evade the doctrine of stare decisis.

"The stare decisis doctrine rests on a solid bedrock of practicality: 'no judicial system could do society's work if it eyed each issue afresh in every case that raised it.' "[112] Consistent with the stare decisis doctrine, Alaska appellate courts

> have consistently held that a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling: "We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[113]

The tentative decision in this case evades the stare decisis doctrine by reaching an interpretation of the 2006 sentencing statute directly opposite the interpretation this court reached in *Collins*—without first establishing that *Collins* "was originally

---

intent—the statements themselves, one or both chambers' approval of the bill containing the statements, the enactment of the bill into law, or something else?

[111] Tentative Decision, *Collins v. State*, A-12816, at 7 (Dec. 8, 2020).

[112] *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004) (quoting *Pratt & Whitney Canada, Inc. v. United Technologies*, 852 P.2d 1173, 1175 (Alaska 1993) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992))).

[113] *Thomas*, 102 P.3d at 943 (quoting *State, Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003)).

erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[114]

This threshold test for reconsidering a prior appellate ruling reveals an essential problem with the tentative decision: In it, the legislature's 2013 amendment drives this court's interpretation of the 2006 sentencing statute as if this court had never before interpreted the 2006 statute.[115] But this court did interpret the 2006 sentencing statute in its published decision in *Collins*, and current circumstances do not show any compelling reason for this court to revisit that decision. *Collins* could not have been originally erroneous based on the 2013 amendment, as the 2013 amendment did not exist at the time. Conditions could not have changed to render *Collins* unsound because, if the 2013 amendment constituted changed conditions, it would be a change, not a "clarification," of the law. And it is unclear what good would come from reconsidering *Collins* at this point.

Moreover, an intermediate appellate court's decisions must be followed not only by lower courts but by the intermediate appellate court itself; that is, "[a] panel of an intermediate appellate court is bound by a prior decision of another panel of the same court addressing the same question . . . unless overturned by an intervening decision from a higher court."[116] *Collins* and *Seigle* were decided by different panels of this court, and the state's petition for review in *Jack* was denied by still another

---

[114] *Id.* (quoting *State, Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003)).

[115] Tentative Decision, *Collins v. State*, A-12816, at 17-21 (Dec. 8, 2020).

[116] 5 Am.Jur.2d *Appellate Review* § 518 (updated Nov. 2020).

panel of this court.[117] This panel of this court is bound by those decisions and should not reconsider *Collins*—at least not until circumstances satisfy the threshold burden for reconsidering it.

E. Application of "the doctrine of clarifying legislation" in this case would erode the federal and state ex post facto clauses.

As the tentative decision recognizes, "[t]he *ex post facto* clause of the constitution forbids the legislature from enacting or amending a penal statute so as to retroactively criminalize, or increase the penalty for, acts that have already been committed."[118] But the tentative decision then describes how reliance on "the doctrine of clarifying legislation" can circumvent and erode that constitutional mandate: "[W]hen a new legislative enactment qualifies as 'clarifying' legislation, the courts treat the pre-existing version of the statute as *always* meaning what the clarifying enactment declared it to mean."[119] In other words, if this court determines an enactment is "clarifying legislation," it has retroactive effect. To avoid eroding the ex post facto clause, particularly under the Alaska Constitution,[120] this court must not apply this doctrine to nullify an appellate court's previous interpretation of a criminal statute.

---

[117] Chief Judge Coats and Judges Mannheimer and Bolger decided *Collins*; Chief Judge Mannheimer and Judges Allard and Hanley decided *Seigle*; and Chief Judge Mannheimer and Judges Allard and Wollenberg denied the state's petition for review in *Jack*.

[118] Tentative Decision, *Collins v. State*, A-12816, at 5-6 (Dec. 8, 2020).

[119] *Id.* at 6 (Dec. 8, 2020) (emphasis in original).

[120] U.S. Const. art. I, § 9; Alaska Const. art. I, § 15; *Doe v. State*, 189 P.3d 999, 1003-07, 1019 (Alaska 2008) (holding ex post facto clause of the Alaska Constitution broader than that of the United States Constitution).

This court previously interpreted the 2006 sentencing statute, in this case, thereby resolving any ambiguity as to its meaning.[121] The tentative decision now reaches the opposite interpretation of the same statute, in the same case, because a subsequent legislature said the prior legislature intended the original statute to have the opposite interpretation.[122] Regardless of the label the tentative decision gives its analytical model, the treatment nonetheless violates the ex post facto clause.

As the tentative decision explains, its sole basis for now reaching the opposite interpretation of the 2006 sentencing statute is that the legislature's 2013 amendment declared as much.[123] This is the same case that prompted the legislature's 2013 amendment.[124] And it is clear that it increases the penalty Collins faces: Following the previous resolution of his appeal under the 2006 sentencing statute, Collins was entitled to seek referral of his case to the three-judge panel on two grounds.[125] According to the tentative decision under the 2013 amendment, Collins is no longer entitled to seek such referral.[126] If this court deems the 2013

---

[121] *Collins v. State*, 287 P.3d 791 (Alaska App. 2012); *see also supra* Part II.C.

[122] Tentative Decision, *Collins v. State*, A-12816, at 18 (Dec. 8, 2020).

[123] *Id.*

[124] *Id.*

[125] *Collins*, 287 P.3d at 797 ("[W]e conclude that a defendant's case should be referred to the three-judge sentencing panel . . . if the defendant shows, by clear and convincing evidence, that the legislature's assumptions do not apply to him—either that the defendant does not have a history of unprosecuted sexual offenses, or that the defendant has prospects for rehabilitation which, in other offenders, would be considered 'normal' (or 'good').").

[126] Tentative Decision, *Collins v. State*, A-12816, at 19 (Dec. 8, 2020) ("We therefore hold that Collins and other similarly situated offenders are not entitled to

amendment "clarifying legislation" that does not violate the ex post facto clause, it could allow future legislative amendments to have retrospective effect notwithstanding the ex post facto clause.

F. Application of "the doctrine of clarifying legislation" in this case would overlook the rules of strict construction and lenity.

The tentative decision does not reconcile "the doctrine of clarifying legislation" with the rules of strict construction and lenity. In those cases remarking that legislators' post-enactment statements of legislative intent can be useful in ascertaining the meaning of pre-existing law, courts sometimes link that usefulness to the fact that the meaning of the pre-existing law was otherwise in doubt in some way. That was the basic idea in *Stafoff*[127] and in *Sisters of Providence*.[128]

This approach becomes problematic when interpreting criminal statutes. "The rule that ambiguities in criminal statutes are to be narrowly read and strictly construed against the state is well established in Alaska"[129] and "applies equally to provisions governing sentencing and provisions defining crimes."[130] Thus, "[i]f a statute is susceptible of more than one meaning, it should be construed so as to

---

seek referral of their cases to the three-judge sentencing panel on the two grounds announced in the *Collins* majority opinion.").

[127] 260 U.S. at 480 (explaining that "a statute purporting to declare the intent of an earlier one might be of great weight in assisting a court *when in doubt*") (emphasis added).

[128] 628 P.2d at 28 (explaining that "dispute or ambiguity surrounding a statute" can be "a strong indication that [a] subsequent amendment was intended to clarify, rather than change, existing law").

[129] *State v. Mullin*, 778 P.2d 233, 236 (Alaska App. 1989).

[130] *State v. Andrews*, 707 P.2d 900, 907 (Alaska App. 1985) (adopted by *State v. Andrews*, 723 P.2d 85, 86 (Alaska 1986)).

provide the most lenient penalty."[131] This rule of statutory construction "has several justifications based on a concern for the rights and freedoms of accused individuals" and "has been accorded the status of a constitutional rule."[132] This rule assures that the judiciary does not usurp the legislative function by enforcing a penalty "the legislature has not clearly and unequivocally prescribed."[133] The rules of strict construction and lenity thus require that Alaska appellate courts read ambiguity or doubt as to the meaning of criminal statutes in favor of the defendant. And they must continue to serve that purpose even when they would lead to an interpretation that is inconsistent with legislators' post-enactment statements of legislative intent.

Here, if any ambiguity or doubt as to the meaning of the 2006 sentencing statute existed after *Collins*, or if the legislature's 2013 amendment introduced such ambiguity or doubt, the rules of strict construction and lenity still require this court to interpret the 2006 sentencing statute as it did in *Collins*.

G. Application of "the doctrine of clarifying legislation" in this case is inconsistent with this court's decisions in *Seigle* and *Jack* and could render unknown numbers of criminal defendants' sentences illegal.

The tentative decision does not adequately reconcile—and it is unclear how it could adequately reconcile—this court's decisions in *Seigle* and *Jack* with application of "the doctrine of clarifying legislation" in this case.

---

131 *Id.*

132 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 59:3 (7th ed. 2007).

133 *Id.*

The tentative decision "acknowledge[s] that our conclusion is seemingly at odds with a short passage from" *Seigle*, in which this court referred to the legislature having "amended" the 2006 sentencing statute.[134] But even more problematically, the tentative decision is at odds with this court's holding in *Seigle*.[135] The three-judge panel had sentenced Seigle below the presumptive range, in part based on *Collins*, and this court rejected the state's appeal of that sentence.[136] The state had argued that *Collins* "was never the law in Alaska" and that Seigle's sentence, because it was partly based on an improper non-statutory mitigating factor, was "so fundamentally flawed that the double jeopardy clause . . . [did] not protect it from reversal on appeal."[137] This court rejected those arguments.[138] But the tentative decision—concluding that the legislature's 2013 amendment was actually a "clarification"—adopts the state's argument in *Seigle* that *Collins* "was never the law in Alaska."[139]

The tentative decision does not mention *Jack*. There, this court rejected the state's petition for interlocutory review challenging a sentencing court's referral of a case to the three-judge panel based on *Collins*.[140] The state argued that postponing

---

134 Tentative Decision, *Collins v. State*, A-12816, at 19-20 (Dec. 8, 2020).

135 *See id.* at 21 (acknowledging *Seigle* "may have inferentially turned on the distinction between 'amending' legislation and 'clarifying' legislation" but then "explicitly hold[ing]" the 2013 amendment "clarified" the 2006 sentencing statutes).

136 *Seigle*, 394 P.3d at 630.

137 *Id.*

138 *Id.* at 630-35.

139 *Seigle*, 394 P.3d at 630; *see also* Tentative Decision, *Collins v. State*, A-12816, at 19-21 (Dec. 8, 2020).

140 Order, *State v. Jack*, A-12812 (Apr. 19, 2017); Petition for Review, *State v. Jack*, A-12812 (Feb. 17, 2017).

review would be prejudicial "because double jeopardy will bar the appellate courts from later changing the three-judge panel's imposition of a sentence below the presumptive range."[141] The two justices dissenting from the Alaska Supreme Court's denial of the state's petition echoed this concern about denying interlocutory review.[142] If the legislature's 2013 amendment had "clarified" the meaning of the 2006 sentencing statute so as to effectively void *Collins*, it would have been incumbent upon this court to grant the state's petition for review and assure the three-judge panel would not have the opportunity to sentence Jack on an improper non-statutory mitigating factor.

If this court adopts the view of the legislature's 2013 amendment as set out in the tentative decision, it will face the question discussed in pleadings and decision in *Seigle* and the pleadings and orders in *Jack*—that is, whether the double jeopardy clause protects sentences imposed in reliance on invalid non-statutory mitigating factors from reversal. If this court concludes that such sentences are illegal and not protected by the double jeopardy clause, it would subject Seigle's sentence and unknown numbers of other criminal defendants' sentences to challenge. The state could potentially challenge any sentence imposed in full or partial reliance on *Collins*, regardless whether it led to appellate litigation.

---

[141] Petition for Review, *State v. Jack*, A-12812, at 13 (Feb. 17, 2017).

[142] Order, *State v. Jack*, S-16712, at 3 (Aug. 28, 2017) (Bolger, J., dissenting) ("If the three-judge panel sentences Jack using this non-statutory factor, . . . then the [s]tate will probably lose the opportunity to insist on a sentence within the presumptive range[.]").

For all these reasons, this court should allow its decision in *Collins* and its interpretation of the original 2006 sentencing statute to stand and decline to apply "the doctrine of clarifying legislation" in this case.

III. The Tentative Decision Appropriately Remands This Case for Consideration Whether Sentencing Within the Presumptive Sentencing Range Would Be Manifestly Unjust.

The tentative decision appropriately remands this case for consideration whether—given the totality of circumstances in his case, including his claims that he has committed no prior sexual offenses and has good prospects for rehabilitation—sentencing Collins within the presumptive sentencing range would be manifestly unjust.[143]

As this court explained in *Seigle*, this court's decision in *Collins* "did not alter the analysis that a sentencing judge is required to conduct when a defendant seeks referral to the three-judge panel on the ground that a sentence within the presumptive range would be manifestly unjust."[144] In other words, separate and apart from how "the doctrine of clarifying legislation" affects the legal effect of *Collins*, Collins is entitled to request referral to the three-judge panel based on the totality of circumstances in his case and to have the trial court evaluate that request for referral.[145] As this court has previously instructed, "where the issue of manifest

---

[143] Tentative Decision, *Collins v. State*, A-12816, at 21-23 (Dec. 8, 2020).

[144] *Seigle*, 394 P.3d at 635.

[145] *See, e.g.*, AS 12.55.165; *Seigle*, 394 P.3d at 635; *Smith v. State*, 711 P.2d 561, 569-70 (Alaska App. 1985) (discussing two possible routes to three-judge panel).

injustice appears to be a close one," trial courts should "resolve any doubt in favor of a referral[.]"[146]

SIGNED on January 28, 2021, at Anchorage, Alaska.

ALASKA PUBLIC DEFENDER AGENCY

/s/ Kelly Taylor
KELLY R. TAYLOR (1011100)
ASSISTANT PUBLIC DEFENDER

[146] *Lloyd v. State*, 672 P.2d 152, 155 (Alaska App. 1983) (noting that three-judge panel is always "empowered to remand any case in which it does not believe manifest injustice will occur").